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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1592

70-126

WILLIARD RHOADES,

Petitioner,

v.

CALIFORNIA,

Respondent.

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Petition for a Writ of Certiorari to the California Court of Appeal, Third District

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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, THIRD DISTRICT

Petitioner, Willard Rhoades, respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the California Court of Appeal, Third District, entered in this case on November 5, 1970.

## OPINIONS BELOW

The opinion of the Court of Appeal of November 5, 1970, as modified on November 9, 1970, is reported at 12 Cal.App.3d 720 and attached as Appendix A. The opinion of the Appellate Department, California Superior Court for Shasta County is unreported and attached as Appendix B. The judgment of the California Justice Court for the Burney Judicial District is unreported and attached as Appendix C.

## JURISDICTION

The judgment of the Court of Appeal was entered on November 5, 1970. The California Supreme Court denied a petition for hearing on January 28, 1971. (A copy of that order is attached as Appendix D.) This petition for a writ of certiorari is thus due on or before April 28, 1971. (American Railway Express Co. v. Levee, 263 U.S. 19 (1923).) Execution of judgment has been stayed pending filing and during consideration of this petition. This court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Does 18 U.S.C. §1162 authorize enforcement of state land use laws against Indians on Indian reservations?

2. Even if 18 U.S.C. §1162 authorizes enforcement of state land use laws against Indians on Indian reservations, does section 1162 give sufficient warning of that situation to make a criminal prosecution under those state laws compatible with the due process clause of the Fourteenth Amendment?

## STATUTES INVOLVED

California Public Resources Code §4291, 18 U.S.C. §1162, and the Fourteenth Amendment to the United States Constitution are set out in Appendix E.

## STATEMENT OF THE CASE

Willard Rhoades is an American Indian. His home is on the Big Bend Rancheria, a California Indian reservation[1] which is held in trust by the United States.

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1. A California Indian rancheria is legally indistinguishable from a California Indian reservation. The difference between the two is merely semantic. Opinion M 28958 of the Interior Department Solicitor (1939); Hearings on H.R. 2576, H.R. 2824, H.R. 2838, and H.R. 6364 before the Indian Affairs Subcommittee of the House Committee on Interior and Insular Affairs, 85th Cong., 1st Sess. (1957) at pages 67-68.

In the summer of 1969 the Burney Justice Court convicted Mr. Rhoades of violating Section 4291 of the California Public Resources Code, because he failed to clear the 30 feet closest to his house of all but single specimens of trees and ornamental shrubbery. On August 11, 1969, the justice court imposed sentence after considering a brief by California Indian Legal Services as amicus curiae in support of the defendant. (See Appendix C.) That brief made the same contentions raised in this petition, i.e. 18 U.S.C. §1162 does not authorize California to enforce section 4291 on the rancheria or in the alternative 18 U.S.C. §1162 does not give fair warning that it authorizes enforcement of section 4291.

The same claims were raised by brief on Appeal to the Appellate Department of the Shasta County Superior Court. That court reversed the conviction and held that 18 U.S.C. §1162 does not allow California to enforce section 4291 against an Indian on the Big Bend Rancheria.

Upon petition by the state, the California Court of Appeal granted a transfer on certification. Briefs in support of Mr. Rhoades' position were filed by his counsel and by California Indian Legal Services as amicus curiae. The Court of Appeal held that 18 U.S.C. §1162 authorizes enforcement of section 4291 against an Indian on a reservation and accordingly reversed the Appellate Department of the Shasta County Superior Court.

On January 28, 1971, the California Supreme Court denied Willard Rhoades' petition for a hearing.

## REASONS FOR GRANTING THE WRIT

### I

WHETHER 18 U.S.C.§1162 AUTHORIZES ENFORCEMENT OF STATE LAND USE LAWS AGAINST INDIANS ON INDIAN RESERVATIONS - - AS THE STATE COURT HELD §1162 DOES - - IS A SUBSTANTIAL FEDERAL QUESTIONS NOT YET DETERMINED BY THIS COURT.

A. States May Not Enforce Their Land Use Laws Against Indians on Indian Reservations Without Express Federal Authorization.

Prior to 1953 the states had no authority to control the use of Indian trust land. (The Effect of County Zoning Ordinances on Land Acquired by the United States in Trust for Indians, 58 I.D. 52 (1942); Applicability of Health and Sanitation Laws of the State of California on Indian Reservations, Opinion M-36768 of the Interior Department Solicitor (2/7/69).) The reasons were twofold. First, state police powers may never interfere with federally sanctioned uses of government property. (58 I.D. 52, supra; Opinion M-36768 of the Interior Department Solicitor, supra.) Second, state laws, in the absence of express federal authorization, may not infringe on "the right of reservation Indians to make their own laws and be ruled by them." (Williams v. Lee, 358 U.S. 217, 220 (1959).) That is, reservation Indians have the right of self government in their own territory. They may accommodate building codes to their poverty and conservation laws to their love of nature. They may even elect to have no regulations at all. (Arizona v. Turtle 413 F.2d 683, 686 (9th Cir. 1969).)

Authorization by federal statute is thus prerequisite to a state's application of its land use laws to Indians on an Indian reservation.

B. 18 U.S.C. §1162 Does Not Give California Authority to Enforce Its Land Use Laws (Such as Public Resources Code §4291) Against An Indian on A Reservation.

In 1953 Congress passed Public Law 280 (67 Stat. 588). Sections 2 and 4 of that law (now 18 U.S.C. §1162 and 28 U.S.C. §1360) made many civil and criminal laws of certain states, including California, applicable in Indian country. However, P.L. 280 also restricted the states' new jurisdiction in several ways.

One restriction in 18 U.S.C. §1162 provides: "Nothing in this section...shall authorize regulation of the use of such property [held in trust by the United States] in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto." In Opinion M-36768, supra, the Interior Department Solicitor ruled that any state regulation of the use of trust property was impermissible under 18 U.S.C. §1162, because such regulation would interfere with the Secretary of the Interior's comprehensive statutory and regulatory responsibilities[2] in the management of trust property. (Opinion M-36768 at 1-3.)

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2. 25. U.S.C. §§81, 86, 123a, 176-182, 184-185, 196, 202, 211, 229, 294, 311-328, 331-358, 371-380, 381-390, 391-415d, 461-462, 463e-465, 466-468, 483-483a; 25 C.F.R. Parts 120, 121, 125, 128, 129, 131, 132, 141, 142, 144, 151-153, 161-163, 171, 172, 203, 242.

As the Solicitor stated:

> "The language of Public Law 280 and its legislative history make quite clear that it was not intended to invest the states with jurisdiction over trust property. This Department consistently has held that the statute furnishes no basis for the application of state or local zoning, construction, or other land use laws, regulations, or standards to trust property. Authority with respect to such property is reposed exclusively in the Federal and tribal governments." (Opinion M-36768 at 2.)

That ruling is consistent with the holding of Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, that comprehensive federal regulation of Indian traders precludes application of state sales tax laws to their transactions with Indians even in the absence of federal sales tax regulations. That is, state regulation is inconsistent with federal statutes and regulations whenever federal regulation of an area is comprehensive; direct, irreconcilable conflict is not necessary.

Section 4291 of the California Public Resources Code is plainly a state land use law of the type the Interior Department Solicito ruled inconsistent with federal law and unauthorized by 18 U.S.C. §1162. No flamable vegetation can be within 30 feet of a house in mountain and forest areas except "single specimens of trees, ormanental shrubbery, or similar plants," and the State Forester may extend the 30 feet to 100. All dead limbs must be removed from trees, and trees must be cut if they are less than 10 feet from a chimney. In short, section 4291 authorizes

only neat suburban living. Application of section 4291 to Indian reservations is therefore inconsistent with the federal government's occupation of the Indian land use field and unauthorized by 18 U.S.C. §1162.

Moreover, application of section 4291 to unalloted Indian reservations, such as the Big Bend Rancheria, is directly inconsistent with 25 C.F.R. §141.3(a)(5) which provides:

"The following objectives are to be sought in the management of unallotted Indian forest lands in accordance with the principles of sustained yield . . . (5) the preservation of the forest in its natural state wherever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products."

The other restriction in 18 U.S.C. §1162 which bars application of section 4291 in this case provides "nothing in this section shall authorize . . . the encumbrance . . . of any real property . . . that is held in trust by the United States. . . ."

Like all federal Indian laws, this provision must be construed in the way that is most favorable to Indians. (Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Choate v. Trapp, 224 U.S. 665, 675 (1912); United States v. Celestine, 215 U.S. 278, 290 (1909); Arenas v. Preston, 181 F.2d 62, 66 (9th Cir. 1950), cert. denied 340 U.S. 819.)

Thus, Snohomish County v. Seattle Disposal Company, 425 P. 2d 22, 26 (Wash. 1967), cert. denied 389 U.S. 1016, held that an encumbrance,

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Thus, Snohomish County v. Seattle Disposal Company, 425 P. 2d 22, 26 (Wash. 1967), cert. denied 389 U.S. 1016, held that an encumbrance,

within the meaning of P.L. 280,[3] is "any 'burden upon the land depreciative of its value.'" The court there ruled a zoning ordinance to be an encumbrance and refused to enjoin a garbage dump that would have been illegal had the ordinance been applicable on Indian land. The court correctly rejected the contention that the ordinance could be applied because the dump would affect adjoining lands and their inhabitants.

The logic of Snohomish is equally applicable to this case. The restrictions imposed by section 4291 are anathema to Willard Rhoades and other traditional Indians. They prevent such Indians from placing their houses in settings created by nature. They make the land less valuable to Willard Rhoades in both monetary and non-monetary terms. The restrictions of section 4291 are, accordingly, encumbrances, which are not authorized by 18 U.S.C. §1162, even if the state reasonably believes that such restrictions protect people and property on and off the reservation.

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3. Although Snohomish involved a Washington statute, the anti-encumbrance provision being construed was exactly the same as those in 18 U.S.C. §1162(b) and 28 U.S.C. §1360(b). Washington was able to enact state statutes embodying 18 U.S.C. §1162 and 28 U.S.C. §1360 under section 7 of P.L. 280, now repealed by 25 U.S.C. §1323(b) as to states which did not accept jurisdiction by April 11, 1968.

II

ENFORCEMENT OF STATE LAND USE LAWS AGAINST INDIANS ON INDIAN RESERVATIONS UNDER 18 U.S.C. §1162 IS INCONSISTENT WITH A PRIOR DECISION OF THIS COURT THAT STATUTES MUST GIVE FAIR WARNING THAT CONDUCT IS PUNISHABLE.

Willard Rhoades cannot be prosecuted for ignoring California Public Resources Code §4291 even assuming arguendo that 18 U.S.C. §1162 authorizes enforcement of section 4291 against an Indian on a reservation. Lanzetta New Jersey, 306 U.S. 451 (1939), held that the due process clause of the Fourteenth Amendment bars a state from punishing conduct which statutes do not fairly warn is criminal. In view of Snohomish, supra, and Opinion M-36768 of the Interior Department Solicitor, 18 U.S.C. §1162 cannot be said to give fair warning that section 4291 applies to an Indian or an Indian reservation.

CONCLUSION

For the above reasons, Willard Rhoades cannot lawfully be convicted of violating section 4291 of the California Public Resources Code. This petition for writ of certiorari should be granted, and Mr. Rhoades conviction should be reversed.

This need not expose everyone else to a fire hazard. The federal government may, if it considers natural vegetation a fire hazard, subject Indian reservation to section 4291 and similar laws in other states. Similarly the residents of the Big Bend Rancheria could adopt the state's law.

Dated: April 14, 1971

Respectfully submitted,

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By _____
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APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Shasta)

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. WILLARD RHOADES, Defendant and Appellant. | 3 Criminal 5726 Filed: November 5, 1970 |

Defendant-appellant was found guilty of violation of Public Resources Code section 4291.[1] That section, so far as it is pertinent herein, requires any person who owns or controls any building in, upon or adjoining forest-covered lands to maintain a firebreak of a specified width around a building by removing flammable growth therefrom. (Id. subd. (a).) Section 4021 makes the wilful violation of section 4291 a misdemeanor. Defendant was convicted in the Justice Court of Burney Judicial District, Shasta County. The appellate division of the Shasta County Superior Court reversed the conviction. Reversal was not based upon any lack of evidence. Facts were conceded. There was no contention of other error--except one. Defendant is an Indian; the premises involved are Indian trust lands. The reversal in the superior court was based upon the court's holding that section 4291 does not apply to Indians living upon Indian trust lands. This

1. All code references herein, unless otherwise speficified, are to the Public Resources Code.

matter reaches us through certification under California Rules of Court, rule 61 et seq.

The federal government, and thefore Congress, has exclusive original jurisdiction over Indians and Indian trust lands. The jurisdiction rests fundamentally upon the provisions of article I, section 8, subdivision 3, of the United States Constitution which, among the powers granted to Congress, includes the power to regulate commerce with the Indian tribes. That seemingly slender reed (originally) has become an all-encompassing, impregnable, exclusive jurisdiction over all Indian affairs--by "long-continued legislative and executive usage and an unbroken current of judicial decisions." (41 Am. Jur. 2d, Indians, §50, p. 858.) "It is [however] within the power of Congress to provide that the laws of a state shall extend over and apply to Indian country." (Id. §63, p. 868.)

Public Law 280 (Act of August 15, 1953, 67 Stats. 588, 18 U.S.C. §1162) provides that certain states, of which California is one, shall have jurisdiction over offenses commited by Indians in certain Indian country. The trust lands on which the offense with which Rhoades was charged had been committed (Big Bend Rancheria) lie within that country. That statute, however, provides "[n]othing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . belonging to any Indian. . . ." (Italics ours.) It was the position of the Shasta County Superior Court that the requirements of section 4291 constitute an encumbrance. We do not so regard it.

Putting to one side the applicability of the section to persons->householders, if you will-other than Indians, it cannot be questioned that section 4291 is a valid exercise of the state's police power. It is a

regulatory measure designed to preserve California's forests from conflagration. "Police power" has been described simply as the power of sovereignty to govern--the inherent reserved power of the state to subject individual rights to reasonable regulations for the general welfare. (See Western Indemnity Co. v. Pillsbury (1915) 170 Cal. 686, and generally 3 Witkin, Summary of Cal. Law (7th ed.) Constitutional Law, §158, p. 1968, and cases there cited.) Where the police power is legitimately exercised, uncompensated submission is exacted of the property owner if his property be either damaged, taken or destroyed. (Gray v. Reclamation District No. 1500 (1917) 174 Cal. 622, 638.) In the Gray case it was held that a temporary, prospective, possible inconvenience to a property owner during the process of the construction of a great statewide flood control project which when completed would be of great benefit not only to landowners as a whole but to the plaintiffs in particular was a proper exercise of the police power. Similarly, it can be said that the maintenance of an area free from combustible materials around buildings in forests is quite as much (if not more) for the benefit of the householder whose building or buildings will be directly involved as for the public at large. With that preliminary observation we turn to the specific question.

At the outset we note that the problem is one of statutory interpretation. By use of the word "encumbrance" in 18 United States Code section 1162 what did Congress intend? Starting with the premise that this law like all federal Indian laws must be construed in the manner most favorable to Indians (Elser v. Gill Net Number One (1966) 246 Cal.App. 2d 30, 36; Alaska Pacific Fisheries v. United States (1918) 248 U.S. 78, 89; 63 L.Ed. 138, 141; Choate v. Trapp (1912)

224 U.S. 665, 675, 56 L.Ed. 941, 946; Arenas v. Preston (9th Cir. 1950) 181 F.2d 62, 66), Rhoades places principal reliance upon Snohomish County v. Seattle Disposal Co. (Wash. 1967) 425 P.2d 22, in which the Supreme Court of Washington held zoning ordinances to be an encumbrance upon Indian lands within the meaning of 28 United States Code section 1360 (identical in its provisions in the respects material here with 18 U.S.C., §1162). It was a divided decision. The majority opinion defined "encumbrance" as "any 'burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee. '" That definition accords with comprehensive definitions of "encumbrance" in the legal sense as contained in words and phrases definitions of the standard works on American Law (see e.g., 42 C.J.S., Incumbrance or Encumbrance--Legal Sense, p. 549). We doubt if even a definition as broad as that one would cover the restrictions of section 4291. As we view it, it would not be a burden upon Rhoades' land "depreciative of its value" to require that it be so maintained as not to be a hazard to forest lands in general and to Rhoades' lands in particular. We prefer the more common sense approach of dissenting judge Hale and the other dissenting judges in Snohomish. The dissenting opinion says (on pp. 27-28): "The broad general meaning employed by the majority . . . is not called for by the statute. The term 'encumbrance' should be given its more . . . precise meaning--one denoting a burden on the land and affecting the title thereto or one impairing the power of alienation such as a mortgage, lien, easement, lease, or other disability to fee ownership." In short, this court takes the position that by "encumbrance" Congress intended to protect the Indian against his own profligacy--against

those who throughout history have exploited the Indian. And we direct attention to the fact that in Public Law 280 the word "encumbrance" (in the restrictive sentence referred to above) is used in the same series as the word "alienation."

The brief of amicus curiae, "California Indian Legal Services," says on page 5 that the type of restriction embraced in Public Resources Code section 4291 "is anathema to traditional Indians like Willard Rhoades. It makes his land less valuable to him in both monetary and non-monetary terms." To the observation that to Mr. Rhoades his lands may seem intrinsically less valuable we can make no judgment. We have observed above that with the first term--"monetary value"--we disagree. On pages 10 and 11 comforting intelligence is conveyed: "This [i.e., right of Indians to disregard section 4291] need not expose everyone else to a fire hazard. The federal government may, if it considers natural vegetation a fire hazard, subject Indian reservations to section 4291 and similar laws . . . ." Meanwhile, we infer, the citizens of California and elsewhere must--while they await action by the federal government--suffer to see the forest and grasslands destroyed, as 400,000 acres were laid waste by fire in California recently at a cost of millions of dollars and a loss of irreplaceable trees. We take judicial notice that both accidental and uncontrolled debris burning around habitations is the source to which many forest fires can be traced. We are not to be understood as singling out Indians or Indian rancherias as offenders. We do not accept the proposition, however-advanced particularly by amicus curiae--that Congress by its use of "encumbrance" intended to give Indians or Indian trust lands (alone among a state's inhabitants) a free ticket

to endanger the state's forest and grass lands, an interpretation of the restrictive clause of Public Law 280 which is strained and unnecessary.

Neither do we find that section 4291 as applied to Indians violates due process--which is a second line trench argument advanced but without cognizable worth.

The judgment of the Shasta County Superior Court is reversed. The judgment of the Justice Court of Burney Judicial District is affirmed.

Pierce, P.J.

We concur:

Regan, J.

Mundt, J. pro tem.

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SHASTA

Hon. Richard B. Eaton, Judge

Date: January 27, 1970

#40350

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff,

vs

WILLARD RHOADES,

Defendant.

NATURE OF PROCEEDINGS

MEMORANDUM OF DECISION

Defendant, a person of California Indian descent, maintains a building in the Big Bend Rancheria, an area in the mountains of Shasta County, which is held in trust by the United States for certain Indian families.

Defendant failed to maintain a clear 30 foot firebreak around that building. He was thereupon convicted on April 8, 1969, in the Burney Justice Court of the County of Shasta, of a violation of California Public Resources Code Section 4291, which requires that "any person that -- maintains a building in -- any mountainous area -- shall --, maintain around-- such building a firebreak by removing -- for a distance not less than 30 feet -- all flammable vegetation --."

Defendant appeals his conviction upon the sole ground that the statute cited has no application to Indian trust lands. This issue is governed by the following principles and authorities:

1. The Government of the United States of America, as sovereign, is lord paramount of the lands it owns. It also has exclusive constitutional jurisdiction over Indian affairs (Constitution, Article 1, section 8 (3)).

2. The United States, by statute (public law 280 of 1953 - 11 USCA Section 11(2), has consented that "the State of California" in "all Indian country within the State" shall have jurisdiction over "all offenses committed by Indians," except that "nothing in this section shall authorize the -- encumbrance -- of any real -- property -- belonging to any Indian -- that is held in trust by the United States."

3. It has been held that a local zoning ordinance is an "encumbrance" when applied to Indian trust land (Snohomish County vs Seattle Disposal Co. 425 P2d. 22 - 1967.)

4. The United States, in 1965, provided by regulation that none of the "laws of any State limiting -- or otherwise -- regulating -- the use of any real -- property shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian that is held in trust by the United States" unless "The Secretary of the Interior - in specific cases adopt or make applicable to Indian Land - any part of such laws." (25 CFR Section 1.4 - 1965.)

5. Thereupon, the Secretary did "adopt and make applicable -- the laws -- of the State of California -- limiting or otherwise regulating the use of -- real -- property leased

from or held under agreement with and belonging to any Indian -- that is held in trust by the United States -." (FR Doc. 65-7193 - July 8, 1965).

6. It has been held that a state mobile home park regulation is applicable to such a park on leased Indian trust land (County of San Bernadino v. LaMar, 271 ACA 821.)

7. Under authority of the Federal Regulation quoted, the Secretary has properly determined, as the LaMar case accurately holds, that California land use law applies to Indian trust lands leased from (or held under some other agreement with) Indians; However, the express language of the regulation, and of the Secretary's order, appears to have no application to Indian trust lands still retained and used by the Indians themselves.

8. As to such lands, the statute quoted still provides, as the Snohomish case held, that state land use law does not apply.

9. The fashion in which California Indians improve or fail to improve Indian trust lands in their occupancy is a matter of land use, and therefore remains as yet a matter for the United States to determine. Resulting fire hazards can only be a subject of protest by the California State Division of Forestry to the Office of Indian Affairs, U.S. Department of the Interior.

10. The Federal Government, in its own time and way, must decide (whether directly or by authority delegated to the states) the degree to which increasing congestion of population compels regulation of land use by Indians on rancherias.

11. The California statute quoted having no application to the Big Bend Rancheria, defendant cannot in this case be guilty of a violation of such statute.

The judgment of conviction entered in the Justice Court of Burney Judicial District is reversed and the case remanded to that Court, with instructions to dismiss the complaint.

RICHARD B. EATON
Judge of the Superior Court

APPENDIX C

IN THE JUSTICE COURT OF BURNEY
JUDICIAL DISTRICT

CONTINUATION

DOCKET 11-266

PEOPLE

VIOLATION 4291
PUBLIC RESOURCES CODE

vs.

WILLIARD RHOADES

AUGUST 11, 1969, 10:00 A.M. Defendant, RHOADES, appeared in court for sentencing. After reading and studying briefs summitted [sic] by California Indian Legal Services and the Shasta County District Attorneys office it is the opinion of this Court that it does have the jurisdiction over this case.
Therefore a fine of $125.00 and 90 days county jail sentence was imposed. 90 days to be suspended if $125.00 is paid by September 15, 1969 and that Defendant cleans his property to specifications of the U.S. Forest Service. Placed on Probation for 3 (three) years, not to be brought in for this violation again. Rhoades stated that he plans to appeal this decision, therefore was given time to pay the fine until September 15, 1969.

August 11, 1969

B. C. Covert, Judge

APPENDIX D

CLERK'S OFFICE SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

January 28, 1971

DEAR SIR: I have this day filed Order

HEARING DENIED

In re: 3 Crim No. 5726

People

vs.

Rhoades

Respectfully,

Clerk

# APPENDIX E

California Public Resources Code §4291
Cal Stats 1965, ch. 1144, §9.6, as amended
by Cal. Stats 1969, ch. 688, §1

Any person that owns, leases, controls, operates, or maintains any building or structure in, upon, or adjoining any mountainous area or forest-covered lands, brush-covered lands, or grass-covered lands or any land which is covered with flammable material, shall at all times do all of the following:

(a) Maintain around and adjacent to such building or structure a firebreak made by removing and clearing away, for a distance of not less than 30 feet on each side thereof or to the property line, whichever is nearer, all flammable vegetation or other combustible growth. This subdivision does not apply to single specimens of trees, ornamental shrubbery, or similar plants which are used as ground cover, if they do not form a means of rapidly transmitting fire from the native growth to any building or structure.

(b) Maintain around and adjacent to any such building or structure additional fire protection or firebreak made by removing all brush, flammable vegetation, or combustible growth which is located from 30 feet to 100 feet from such building or structure or to the property line, whichever is nearer, as may be required by the State Forester if he finds that, because of extra hazardous conditions, a firebreak of only 30 feet around such building or structure is not sufficient to provide reasonable fire safety. Grass and other vegetation located more than 30 feet from such building or structure and less than 18 inches in height above the ground may be maintained where necessary to stabilize the soil and prevent erosion.

(c) Remove that portion of any tree which extends within 10 feet of the outlet of any chimney or stovepipe.

(d) Maintain any tree adjacent to or overhanging any building free of dead or dying wood.

(e) Maintain the roof of any structure free of leaves, needles, or other dead vegetative growth.

(f) Provide and maintain at all times a screen over the outlet of every chimney or stovepipe that is attached to any fireplace, stove, or other device that burns any solid or liquid fuel. The screen shall be constructed of nonflammable material with openings of not more than one-half inch in size.

(g) The State Forester may adopt regulations exempting structures with exteriors constructed entirely by nonflammable materials, or conditioned upon the contents and compositio of same, he may vary the requirements respecting the removing or clearing away of flammable vegetation or other combustible growth with respect to the area surrounding said structures.

No such exemption or variance shall apply unless and until the occupant thereof, or if there be no occupant, then the owner thereof, files with the State Forester, in such form as the State Forester shall prescribe, a written consent to the inspection of the interior and contents of such structure to ascertain whether the provisions hereof and the regulations adopted hereunder are complied with at all times.

18 U.S.C. §1162 (67 Stat. 588)

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| State or Territory of | Indian country affected |
|---|---|
| Alaska | All Indian country within the Territory |
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall

deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section.

Fourteenth Amendment to Constitution

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizen of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Supreme Court, U.S.
FILED
JUN 28 1971
E. ROBERT SEAVER, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. ~~1592~~ 70-126

WILLARD RHOADES,
*Petitioner,*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Respondent.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

## BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1592

WILLARD RHOADES,

*Petitioner,*

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

## BRIEF FOR RESPONDENT IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Appeal of the State of California, in and for the Third Appellate District, was filed on November 5, 1970, and is reported at 12 Cal.App.3d 720, 90 Cal.Rptr. 794. A copy of this opinion is attached to petitioner's brief and marked Appendix A. The California Supreme Court denied a hearing on January 28, 1971. A copy of that order is attached to petitioner's brief and marked Appendix D. The opinion of the Appellate Department of the California Superior Court, in and for Shasta County, was filed on January 27, 1970, and is unreported. A copy of this opinion is attached to petitioner's brief

and marked Appendix B. The judgment of the California Justice Court, Burney Judicial District, County of Shasta, was entered on August 11, 1969, and is unreported. A copy of the judgment is attached to petitioner's brief and marked Appendix C.

## JURISDICTION

Since the instant petition for writ of certiorari was filed on April 17, 1971, and since the order of the Supreme Court of the State of California denying a hearing was entered on January 28, 1971, the jurisdiction of this Court is timely invoked under 28 U.S.C. § 1257(3), and Rule 22 of the Revised Rules of the Supreme Court of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3) rather than 28 U.S.C. § 1254(1) as alleged by petitioner.

## STATUTES INVOLVED

The relevant statutes are set forth in Appendix A. They are the following:

California Public Resources Code § 4291
18 U.S.C. § 1162
United States Constitution, Fourteenth Amendment

## QUESTIONS PRESENTED

1. Does Public Law 280 (Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. § 1162) authorize the enforcement of California Public Resources Code § 4291, a fire safety statute, against petitioner, a California Indian, living on land held in trust by the United States for the benefit of California Indians?

2. Does Public Law 280, 18 U.S.C. § 1162, provide sufficient warning compatible with the due process clause of the Fourteenth Amendment that conduct in violation of state law will result in a criminal prosecution?

## STATEMENT OF THE CASE

On October 28, 1968, a complaint was filed in the California Justice Court of the Mountain Judicial District, Shasta County, charging petitioner with violation of Public Resources Code § 4291, a misdemeanor, in that he failed to maintain a firebreak of not less than 30 feet around a building occupied by him. A copy of this complaint is attached hereto and marked Appendix B. On December 6, 1968, an amended complaint was filed in the California Justice Court of the Burney Judicial District, Shasta County, repeating the above charge and setting forth facts on which the complaint was based. A copy of this complaint is attached hereto and marked Appendix C.

Petitioner is a California Indian and makes his home on the Big Bend Rancheria, which is held in trust by the United States for California Indians. An inspection of his property by Officer Kittell of the State of California Forest Service revealed that garbage, general debris, papers, dried grass, old wood, and leaves, all constituting fire hazards, were present on the property within 30 feet of a building in violation of Public Resources Code § 4291 (Appendix C).

On February 24, 1969, petitioner was arraigned on the complaint and entered a plea of not guilty. The

case was set for trial by jury and on July 8, 1969, the jury returned its verdict, finding petitioner guilty of violation of Public Resources Code § 4291.

The case was appealed to the Appellate Division of the California Superior Court, in and for Shasta County. Petitioner filed the following proposed settled statement of facts on appeal which was concurred in by respondent:

> "Sufficient facts were found at the trial hereof to convict the appellant of a violation of Section 4291 of the Public Resources Code of the State of California if that section is applicable to Indian trust lands. It is conceded that at the time and place charged the appellant did not maintain the firebreak required by that section."

A copy of the proposed settled statement of facts and respondent's concurrence thereto is attached hereto and marked Appendix D.

On January 27, 1970, the Appellate Department of the California Superior Court filed a memorandum decision reversing the judgment of conviction entered in the California Justice Court of the Burney Judicial District. A copy of this opinion is attached to petitioner's brief and marked Appendix C.

On March 13, 1970, the case was transferred on certification to the California Court of Appeal, in and for the Third Appellate District. On November 5, 1970, the California Court of Appeal, in and for the Third Appellate District, filed its opinion affirming the judgment of the California Justice Court of the

Burney Judicial District, and reversing the judgment of the Appellate Department of the California Superior Court, in and for the County of Shasta. This opinion, which is attached to petitioner's brief and marked Appendix A, is reported at 12 Cal.App.3d 720, 90 Cal.Rptr. 794. The Court of Appeal held that 18 U.S.C. § 1162 authorizes enforcement of California Public Resources Code § 4291 against petitioner.

On January 28, 1971, the California Supreme Court denied petitioner's petition for a hearing.

## ARGUMENT

### I. Public Law 280 (Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. § 1162) authorizes the enforcement of California Public Resources Code § 4291, a fire safety statute, against petitioner, a California Indian living on land held in trust by the United States for the benefit of California Indians

#### A. Public Law 280 Evinces Congressional Intent to Extend California's Criminal Jurisdiction to Indian Lands and Land Held in Trust for the Indians.

In 1953 Public Law 280 was enacted by Congress which granted to several states, including California, full civil and criminal jurisdiction over offenses committed in Indian country and over civil causes of action which arose on Indian lands. 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360. *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 72 (1962).

The language of 18 U.S.C. § 1162, which is set forth in full in Appendix A, makes it clear that California's criminal laws may be enforced against petitioner so long as those laws do not constitute an "encumbrance . . . of any real property . . . that is held in

trust by the United States . . .'' The legislative history of Public Law 280 indicates that it was the intent of Congress to turn over the responsibility of application and enforcement of the law with respect to Indians and Indian country to the States. The House Committee on Interior and Insular Affairs, who considered the measure, stated the following:

> "This legislation, . . . has two coordinate aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws applicable to Indians as such." H.R. Rep. No. 848, 83d Cong., 1st Sess. (1953), 2 U.S. Code, Cong. & Admin. News 2409 (1953).

A United States Court of Appeals, in interpreting Public Law 280, made the following comments:

> "In unambiguous terms, Public Law 280 withdrew federal jurisdiction over offenses committed in specified areas of Indian country by the grant of exclusive criminal jurisdiction therein to five designated states." *Anderson* v. *Gladden,* 293 F.2d 463, 466 (9th Cir. 1961), *cert. denied,* 368 U.S. 949.

Petitioner initially contends that California Public Resources Code § 4291 is a land use regulation and thus cannot be enforced against petitioner because of that portion of 18 U.S.C. § 1162(b) which provides as follows:

> "Nothing in this section . . . shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto. . . ." (Petition, page 5.)

It should be noted that the legislative history of the Act demonstrates that Congress intended that all state and local police power regulations, even those regulating land use, are to apply to lands held in trust for Indians. H.R. 1063, 83d Cong., 1st Sess., which eventually became Public Law 280, contained the following language in section 5 when introduced:

> " . . . Provided, that as long as the title to any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, group, or community is held in trust by the United States or is subject to restrictions against alienation under any law, treaty, or agreement of the United States, nothing in this section shall authorize the alienation, encumbrance, or taxation of such property or the adjudication *or regulation of its use,* or shall confer jurisdiction upon the State courts in any civil action, probate, or other proceeding affecting the ownership, title, possession, or any other interest in such property." 99 Cong. Rec. 9962 (1953). (Emphasis added.)

Before the bill was enacted into law, this language was deleted in favor of a prohibition of land use regulation only when such was inconsistent with federal law. Thus, Congress determined that the States should be free to regulate the use of Indian land except when such regulation conflicted with federal law.

In alleging that California Public Resources Code § 4291 is in conflict with federal law, petitioner directs us to no specific Federal treaty, agreement, statute,

or regulation.[1] Instead, petitioner asserts that Opinion M-36768 of the Solicitor of the Department of the Interior is binding authority for the proposition that California does not have jurisdiction over Indian trust land. This opinion is erroneous since it totally ignores and misreads 18 U.S.C. § 1162. Subsection (b) of 18 U.S.C. § 1162 provides, in part, the following:

> "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property . . . that is held in trust by the United States . . ."

The Department of the Interior's conclusion would mean that this language is totally superfluous. If Congress had intended that trust lands be exempted from state laws, there would have been no need for the above language. However, the statute reads that state laws apply to trust lands so long as there is no alienation, encumbrance or taxation of the property, as well as no land use regulation in conflict with federal law. The inclusion of this language conclusively demonstrates that it was the intent of Congress to include Indian trust lands in the grant of power to

[1] Petitioner does assert on page 7 of his brief that California Public Resources Code § 4291 is in direct conflict with 25 C.F.R. § 141.3(a)(5). This argument is totally without merit. A close reading of the entire section reveals that it has reference to Indian *forest lands* and not land on which Indian homesites or other structures are maintained. (The complete text of 25 C.F.R. § 141.3 is set forth in Appendix E.) The regulation concerns the development, preservation, and harvesting of Indian forest land. A requirement of a firebreak around structures does not in any manner conflict with the provisions of this regulation.

the states under Public Law 280, the conclusion to the contrary of Opinion M-36768 notwithstanding.

In any event, Public Resources Code § 4291 is not merely a land use regulation, rather it is a fire safety statute, enacted pursuant to the state's police power, to protect its forests from conflagration. If the action or omission prohibited by the state acting under its police power is one which poses an immediate threat of harm to the surrounding area and its inhabitants, or reasonably appears to do so, then such regulation should be binding on all citizens. Merely because a person is an Indian living on land held in trust for Indians by the United States should not be reason enough, in light of Public Law 280, for him to flout the state's public welfare and safety laws to the danger of himself and surrounding land and people.

Although a state's police power cannot directly regulate a subject which is allocated to the federal government by the Constitution or act of Congress, this Court has stated that it should never be held that Congress intends to supersede or suspend the exercise of the state's police power unless such purpose is clearly manifested. *Reid* v. *Colorado,* 187 U.S. 137 (1902). This Court also held that the exercise of a state's police power is superseded only where the repugnance or conflict is so "direct and positive" that the two laws cannot be reconciled. *Kelly* v. *Washington,* 302 U.S. 1, 10 (1937).

There is no "direct and positive conflict" between California Public Resources Code § 4291 and any Department of the Interior regulation. The Secretary of the Interior has issued regulations governing the leasing of land within Indian reservations (25 C.F.R., part 131), the management of Indian forests (25 C.F.R., part 141), and the grazing of livestock on Indian ranges (25 C.F.R., part 151). Provision is also made for the extinguishing of uncontrolled fires on Indian land (25 C.F.R., part 141.9). An examination of these regulations reveal that they do not in any manner concern fire prevention measures in mountainous or forested Indian lands which contain dwellings and other structures.

Petitioner additionally contends that "section 4291 authorizes only neat suburban living" (Petition, pages 6–7). "The restrictions imposed by section 4291 . . . prevent such Indians from placing their houses in settings created by nature" (Petition, page 8). These statements are untrue. The California statute in question does not require appellant's home to be situated on a suburban-type lot, nor does it prevent him from placing his house "in settings created by nature." The only requirement is that garbage, debris, brush, and other *flammable* materials be cleared for an area of 30 feet around a dwelling or other struc-

ture in mountainous or forested lands.[2] Section 4291(a) also provides the following:

> "This subdivision does *not* apply to single specimens of trees, ornamental shrubbery, or *similar plants* which are used as ground cover, if they do not form a means of rapidly transmitting fire from the native growth to any building or structure." (Emphasis added.)

Petitioner is free to maintain his home in a natural setting complete with trees and other vegetation so long as flammable materials are cleared for an area of 30 feet.

It follows that under Public Law 280, 18 U.S.C. § 1162, California had the power and authority to prosecute petitioner for violation of California Public Resources Code § 4291. The federal statute and its accompanying legislative history conclusively demonstrate that it was the intent of Congress to grant the State of California the authority to undertake criminal prosecutions such as the one involved in the instant case.

**B. A Fire Safety Statute Which Requires the Owner or Occupier of Property in a Mountainous Area to Maintain a Firebreak Around Buildings Does not "Encumber" the Property.**

Petitioner additionally contends that California Public Resources Code § 4291 encumbers his property

[2] The amended complaint filed in the California Justice Court of the Burney Judicial District on December 6, 1968, indicates that petitioner was in violation of § 4291 because the following items were within 30 feet of a building: garbage, general debris, papers, dried grass, old wood, leaves, and overhanging trees, all constituting fire hazards. (Appendix C.) None of these items appear to constitute a "setting created by nature."

since it makes his land less valuable in monetary and nonmonetary terms (Petition, page 8). The case of *Snohomish County* v. *Seattle Disposal Company,* 70 Wash.2d 688, 425 P.2d 22 (1967), *cert. denied,* 389 U.S. 1016, is cited in support of this assertion. The *Snohomish* case held that a county could not obtain an injunction restraining a refuse company from using land leased from Indians as a dumping ground because the county's ordinance constituted an encumbrance on the property in violation of a Washington statute and 28 U.S.C. § 1360.

Petitioner, in relying on this case, seeks to equate California Public Resources Code § 4291 with a zoning ordinance. A fire safety provision cannot be considered the equivalent of a zoning ordinance. Zoning regulations prescribe what uses can and cannot be made of particular land. They may set forth requirements with regard to lot and building size, as well as to whether particular land can be used for commercial, residential, or industrial purposes. *See e.g., Nectow* v. *Cambridge,* 277 U.S. 183 (1928); *Zahn* v. *Board of Public Works,* 274 U.S. 325 (1927); *Euclid* v. *Amber Realty Co.,* 272 U.S. 365 (1926); *City of Moline Acres* v. *Heidbreder,* 367 S.W.2d 568, 572 (Mo. Sup. Ct. 1963); *Angermeier* v. *Borough of Sea Girt,* 27 N.J. 298, 142 A.2d 624, 629 (1958). The *Snohomish* case held that an encumbrance resulted because the "application of the zoning ordinance to prohibit or limit the use of this land for commercial purposes certainly could be considered to diminish its value." 425 P.2d

at 26. A fire safety statute, such as section 4291, does not in any manner prohibit or limit the use of land for commercial or any other purposes, nor does it regulate building or lot size. It merely requires, regardless of the use made of the land, that brush, rubbish, and other flammable materials be cleared and a firebreak maintained for an area of 30 feet surrounding a building in order to prevent needless fires.

> The Washington Court in *Snohomish* held that: " . . . any 'burden upon land depreciative of its value, such as a lien, easement, or servitude which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee' constitutes an encumbrance." 425 P.2d at 26.

The term "encumbrance" has also been defined as "any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee." *Kirkwood* v. *Arenas,* 243 F.2d 863, 867 (9th Cir. 1957). *See also Miller* v. *Schwinn,* 113 F.2d 748, 751 (D.C. Cir. 1940). Neither of these definitions would include a firebreak requirement within the meaning of the term. It would not be a burden on petitioner's land "depreciative of its value" to require that it be so maintained as not to be a hazard to surrounding forest lands.

As the California Court of Appeal pointed out in the opinion below, Congress used the term "encumbrance" in 18 U.S.C. § 1162 in the same series as the word "alienation." It thus appears that Congress in-

tended to protect the Indian against his own profligacy, not against a legitimate exercise of a state's police power to protect his health and safety as well as those around him.

This Court denied a petition for certiorari in the *Snohomish* case over the dissents of Justices Douglas and White. 389 U.S. 1016. In dissenting from the Court's action Mr. Justice Douglas made the following comments:

> "Subjecting respondent lessee to state regulations on garbage and sewage disposal seems no more a burden or encumbrance on the Indians' rights to lease their lands than the state tax on oil production of the non-Indian lessee in *Oklahoma Tax Comm'n* [*Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342] was a burden or encumbrance on the rights of the Indians there involved to make oil leases. In *Oklahoma Tax Comm'n* we said: 'These cases present no question concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ultimate liability for the taxes may fall upon the owner of the land.' 336 U.S. at 353. The same proposition, in a different context, may be true here, since all petitioner demands is that respondent Disposal Company obtain a refuse disposal use permit before commencing operations.
>
> "There may also be merit to the dissent's view that the immunity of Indian lands to a state 'encumbrance' cannot frustrate state programs to check air and water pollution. The States should, perhaps, be able to prevent sewage dumped on Indians' lands from draining into streams which

flow into water supplies outside Indian lands. The same is true of smoke from garbage burned on Indian lands that contributes to smog over nearby cities. State controls in this area may be permissible by virtue of 25 U.S.C. § 231, whether or not they are achieved under the label 'zoning' rather than 'sanitation regulations.'" 389 U.S. 1016, 1019–1020.

## II. The due process clause of the Fourteenth Amendment did not bar the prosecution of petitioner

Petitioner contends that he cannot be prosecuted for violation of California Public Resources Code § 4291 because he has not been afforded fair notice that his failure to comply with the law could be punished, especially in view of the *Snohomish* case and Opinion M-36768 of the Interior Department Solicitor (Petition, page 9). Contrary to this assertion, petitioner has been afforded fair warning that such conduct could and would be prosecuted.

It is settled that a person is presumed to know the law. *Town of South Ottawa* v. *Perkins,* 94 U.S. 260 (1876); *Macias* v. *Commissioner of Internal Revenue,* 255 F.2d 23, 28 (7th Cir. 1958); *MacFarlane* v. *Department of Alcoholic Bev. Control,* 51 Cal.2d 84, 90, 330 P.2d 769 (1958). Public Law 280, 18 U.S.C. § 1162, which provides that California laws may be enforced against Indians living on trust lands so long as there is no alienation, encumbrance, or taxation, was enacted in 1953. This statute is sufficient to provide notice that section 4291 could be enforced against petitioner. Since section 4291 was enacted in 1965,

petitioner was placed on notice concerning the firebreak requirements applicable to his land.

The *Snohomish* decision, a Washington state court case, is of no consequence concerning notice since no presumption exists that a person knows the law of another state (*Smeltzer* v. *White*, 92 U.S. 390 (1875)), and it is not asserted that petitioner had actual notice of that case. Furthermore, since *Snohomish* dealt with a zoning ordinance on leased Indian land, it would not indicate to appellant that his failure to comply with California Public Resources Code § 4291 would not be punished. Assuming *arguendo* that petitioner had actual notice of the *Snohomish* case, he would not be warranted in concluding that a similar result would be applied in California in a nonzoning case where an encumbrance on land was not involved.

Solicitor's Opinion M-36768 cannot be used to shield petitioner from notice of Public Law 280. As discussed *supra,* this opinion is unsound in that it misreads the provisions of 18 U.S.C. § 1162. Furthermore, petitioner has not alleged that he had actual notice of the opinion and there is no presumption that a person has actual notice of such a document. *See Van Antwerp* v. *United States*, 92 F.2d 871, 875–876 (9th Cir. 1937); *American Safety Razor Corp.* v. *United States,* 6 F.Supp. 293, supplemented 7 F.Supp. 196 (Ct.Cl. 1934), *cert. denied* 293 U.S. 599.

It appears from the record that petitioner has been afforded actual notice that his failure to maintain a firebreak would lead to prosecution. The amended complaint charging petitioner with violation of section

4291 filed in the California Justice Court of the Burney Judicial District on December 6, 1968, indicates that Officer Kittell of the Forest Service personally inspected petitioner's land several times between June 1, 1968, and December 3, 1968 (Appendix C). It appears that Officer Kittell advised petitioner that the garbage, debris, paper, and other flammable materials must be cleaned up or charges would be brought. In spite of such warnings, petitioner refused to comply. He cannot now complain that he had no notice that he could be prosecuted.

## CONCLUSION

Respondent submits that for the foregoing reasons, the instant petition for writ of certiorari should be denied.

EVELLE J. YOUNGER
*Attorney General*
of the State of California

DORIS H. MAIER
*Assistant Attorney General*

DANIEL J. KREMER
*Deputy Attorney General*

LOREN E. McMASTER
*Deputy Attorney General*
Attorneys for Respondent

**§ 4291. Firebreaks; trimming of trees; chimney screens; variance or exemption by regulations of state forester**

Any person that owns, leases, controls, operates, or maintains any building or structure in, upon, or adjoining any mountainous area or forest-covered lands, brush-covered lands, or grass-covered lands, or any land which is covered with flammable material, shall at all times do all of the following:

(a) Maintain around and adjacent to such building or structure a firebreak made by removing and clearing away, for a distance of not less than 30 feet on each side thereof or to the property line, whichever is nearer, all flammable vegetation or other combustible growth. This subdivision does not apply to single specimens of trees, ornamental shrubbery, or similar plants which are used as ground cover, if they do not form a means of rapidly transmitting fire from the native growth to any building or structure.

(b) Maintain around and adjacent to any such building or structure additional fire protection or firebreak made by removing all brush, flammable vegetation, or combustible growth which is located from 30 feet to 100 feet from such building or structure or to the property line, whichever is nearer, as may be required by the State Forester if he finds that, because of extra hazardous conditions, a firebreak of only 30 feet around such building or structure is not sufficient to provide reasonable fire safety. Grass and other vegetation located more than 30 feet from such building or structure and less than 18 inches in height above the ground may be maintained where necessary to stabilize the soil and prevent erosion.

(c) Remove that portion of any tree which extends within 10 feet of the outlet of any chimney or stovepipe.

(d) Maintain any tree adjacent to or overhanging any building free of dead or dying wood.

(e) Maintain the roof of any structure free of leaves, needles, or other dead vegetative growth.

(f) Provide and maintain at all times a screen over the outlet of every chimney or stovepipe that is attached to any fireplace, stove, or other device that burns any solid or liquid fuel. The screen shall be constructed of nonflammable material with openings of not more than one-half inch in size.

(g) The State Forester may adopt regulations exempting structures with exteriors constructed entirely of nonflammable materials, or conditioned upon the contents and composition of same, he may vary the requirements respecting the removing or clearing away of flammable vegetation or other combustible growth with respect to the area surrounding said structures.

No such exemption or variance shall apply unless and until the occupant thereof, or if there be no occupant, then the owner thereof, files with the State Forester, in such form as the State Forester shall prescribe, a written consent to the inspection of the interior and contents of such structure to ascertain whether the provisions hereof and the regulations adopted hereunder are complied with at all times.

## UNITED STATES CODE, TITLE 18

**§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country**

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses

committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| State or Territory of | Indian country affected |
|---|---|
| Alaska | All Indian country within the Territory |
| California | All Indian country within the State |
| Minnesota | All Indian country within the State, except the Red Lake Reservation |
| Nebraska | All Indian country within the State |
| Oregon | All Indian country within the State, except the Warm Springs Reservation |
| Wisconsin | All Indian country within the State |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with re-

spect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section.

## UNITED STATES CONSTITUTION

### Fourteenth Amendment

#### Citizenship, Representation, and Payment of Public Debt

**Citizenship**

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Apportionment of Representatives**

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Disqualification for Public Office**

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Public Debt, Guarantee of**

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Power of Congress**

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

IN THE

# JUSTICE COURT OF MOUNTAIN JUDICIAL DISTRICT

County of Shasta, State of California

The People of the State of California,
Plaintiff,
vs.
WILLARD RHODES,
Defendant.

## COMPLAINT---CRIMINAL

Personally appeared before me, this 28th day of October 1968, IRA T. KITTELL of U. S. FOREST SERVICE on information and belief, in the County of Shasta, who, being first duly sworn/complains and accuses WILLARD RHODES of the crime of misdemeanor, to-wit: VIOLATION OF 04291, PUBLIC RESOURCES CODE,

committed as follows:

That said WILLARD RHODES from on or about the 1st day of June, 1968 to the present time, at Mountain Judicial District and in the County of Shasta, State of California, did wilfully and unlawfully fail to maintain a firebreak around a building but not less than thirty (30) feet of each side thereof or to the property line whichever is near.

BEST AVAILABLE COPY

Said complainant therefore prays that a warrant may be issued for the arrest of the said WILLARD RHODES and that he be dealt with according to law.

/s/ IRA T. KITTELL

Subscribed and sworn to before me this 28th day of October A. D., 1968

/s/ JOSEPH BERTAGNA
Judge of said Judicial District

# JUSTICE COURT OF BURNEY JUDICIAL DISTRICT

County of Shasta, State of California

The People of the State of California,
Plaintiff,
vs.

WILLARD WESTLY RHOADES
Defendant.

BEST AVAILABLE COPY

## AMENDED COMPLAINT---CRIMINAL

Personally appeared before me, this 6th day of December 19 68, WILLIAM R. LUND, JR. of DEPUTY DISTRICT ATTORNEY on information and belief, in the County of Shasta, who, being first duly sworn, complains and accuses WILLARD WESTLY RHOADES of the crime of misdemeanor, to-wit: VIOLATION OF SECTION 4291, PUBLIC RESOURCES CODE,

committed as follows:

That said WILLARD WESTLY RHOADES on or about the 1st day of June, 19 68 from to the present time at Burney Judicial District and in the County of Shasta, State of California,

did wilfully and unlawfully fail to maintain a firebreak around a building but not less than thirty (30) feet of each side thereof or to the property line whichever is nearer.

THIS COMPLAINT IS BASED ON THE FOLLOWING FACTS:

On information received from Officer Kittell of the Forest Service, who has personally inspected defendant's property in question several times within the above period, the latest inspection being on the 3rd day of December, 1968. The above named defendant's property has been during this entire period and is still in violation of Section 4291 of the Public Resources Code. Garbage, general debris, papers, dried grass, old wood, leaves and overhanging trees all constituting fire hazards, were and are present on the defendant's property within thirty (30) feet of a building thereon.

Said complainant therefore prays that a warrant may be issued for the arrest of the said WILLARD WESTLY RHOADES and that he be dealt with according to law.

WILLIAM R. LUND, JR.

Subscribed and sworn to before me this 6th day of December A. D., 19 68

CAROLE VOSSEN

CAROLE VOSSEN,
Notary Public in and for said State & County.

#2 - Copy of warrant not available

It appearing to be that the offense of .....

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as charged and set out in the within complaint .....

has been committed, and that there is sufficient cause to believe the within named .....

guilty thereof, I order that he , be held to answer the same, and that he be admitted to bail in the sum of ..... dollars and he hereby committed to the Sheriff of Shasta County, until he give such bail.

Dated ....., 19 .....

JUDGE OF SAID JUDICIAL DISTRICT

No. .....

Docket ..... Page .....

# JUSTICE COURT

JUDICIAL DISTRICT

County of Shasta

The People of the State of California, Plaintiff

vs.

..... Defendant

## Complaint – Criminal

Filed ....., 19 .....

Judge of said Judicial District

Filed ....., 19 .....

Clerk.

By .....

Deputy Clerk.

# APPENDIX D

COSHOW AND BARR
ATTORNEYS AT LAW
1428 WEST STREET
REDDING, CALIFORNIA 96001
(916) 241-6468

JUSTICE COURT OF BURNEY JUDICIAL DISTRICT

COUNTY OF SHASTA, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

WILLARD WESTLY REOADES,

Defendant.

No. 11-226

APPELLANT'S PROPOSED SETTLED STATEMENT

Sufficient facts were found at the trial hereof to convict the appellant of a violation of Section 4291 of the Public Resources Code of the State of California if that section is applicable to Indian trust lands. It is conceded that at the time and place charged the appellant did not maintain the firebreak required by that section.

COSHOW AND BARR

By JOHN D. BARR
JOHN D. BARR

CERTIFICATE OF MAILING (C.C.P. 2015.5)

The undersigned, at Redding, California certifies to be true, under penalty of perjury, that she is over 18 years old, not a party to the within action, business address is 1428 West Street, Redding, California, and is in delivery service to U. S. Mail at each place addressed that she executed this certificate and served a true copy of the foregoing document by mail, by placing same in an envelope, sealing, fully prepaying postage thereon, and depositing said envelope in U. S. Mail at Redding, California, on the 3rd day of Sept 19 68 said envelope was addressed as follows:

Ila J. Reynolds
Ila J. Reynolds

William R. Lund, Jr.
Deputy District Attorney
Courthouse
Redding, California

BEST AVAILABLE COPY

IN THE JUSTICE COURT OF BURNEY JUDICIAL DISTRICT,

COUNTY OF SHASTA, STATE OF CALIFORNIA.

--ooOoo--

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff,<br>vs.<br>WILLARD RHOADES,<br>Defendant. | No. 11-226<br>RESPONDENT'S PROPOSED SETTLED STATEMENT |

Respondent concurs with appellant's proposed settled statement submitted heretofore.

DATED: November 14, 1969

ROBERT W. BAKER
District Attorney

By

WILLIAM R. LUND, JR.
Deputy District Attorney

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(a) The following objectives are to be sought in the management of unallotted Indian forest lands in accordance with the principles of sustained yield:

(1) The preservation of such lands in a perpetually productive state by providing effective protection, by applying sound silvicultural and economic principles to the harvesting of the timber, and by making adequate provision for new forest growth as the timber is removed.

(2) The regulation of the cut in a manner which will insure method and order in harvesting the tree capital, so as to make possible continuous production and a perpetual forest business.

(3) The development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.

(4) The sale of Indian timber in open competitive markets in accordance with good business practices on reservations where the volume that should be harvested annually is in excess of that which is being developed by the Indians.

(5) The preservation of the forest in its natural state wherever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products.

(6) The management of the forest in such a manner as to retain its beneficial effects in regulating water run-off and minimizing erosion.

(7) The preservation and development of grazing, wildlife, and other values of the forest to the extent that such action is in the best interest of the Indians.

(b) Similar objectives are sought in the management of allotted Indian forest lands, but, in addition, the sales of timber shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things:

(1) The state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs.

(2) The highest and best use of the land, including the advisability of devoting it to other uses for the benefit of the owner and his heirs.

(3) The present and future financial needs of the owner and his heirs.

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Supreme Court, U.S.
FILED
SEP 25 1971
E. ROBERT SEAVER, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-126

WILLARD RHOADES,

Petitioner,

v.

CALIFORNIA,

Respondent.

# REPLY BRIEF

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Attorneys for Petitioner

## BASIS FOR REPLY BRIEF

The Brief for the State of California raises four points not discussed in the Petition for Certiorari. A reply brief is therefore proper under Sup. Ct. Rule 24, Subd. 4.

## NEW ISSUES RAISED BY THE STATE

I. Does the legislative history of 18 U.S.C. §1162 demonstrate an intent to make Indian trust lands subject to state land use controls?

II. Are "forest lands", as used in 14 CFR 141.3, and "forest-covered lands", as used in Public Resources Code §4291 logically distinguishable and do these two laws contain conflicting provisions?

III. Are allegations of the presence of "garbage, papers, and general debris" relevant to a prosecution under Public Resources Code §4291?

IV. Does a warning delivered by a Forest Service officer allow prosecution under a statute which otherwise would be void for vagueness?

## ARGUMENT

### I

### THE LEGISLATIVE HISTORY OF 18 U.S.C. §1162 DOES NOT DEMONSTRATE AN INTENT TO SUBJECT INDIAN TRUST LANDS TO STATE LAND USE CONTROLS.

18 U.S.C. §1162 is section 2 of H.R. 1063, 83d Cong, 1st Sess. The State quotes from H.R. 1063 as it was first introduced in the Congress in an effort to show that later rewording of the bill evidences an intent to allow states to apply their land use regulations except when they conflict with a particular federal law. A closer look at the legislative history demonstrates that no such intent was manifested. Congress changed H.R. 1063 for technical reasons and did not intend to change the rule that state law is inconsistent with federal Indian laws whenever federal law occupies a field of Indian activity, as in Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 or the area of land use.

A total of six bills were introduced into the House of Representatives during the first session of the 83d Congress dealing with the creation of state criminal and civil jurisdiction over Indian lands.[1] Each of these bills, however, applied to only one state. H.R. 1063, for instance, applied only to California. It was sent into committee along with the five other bills.

Senator Thye had introduced in the Senate S.2467, which also was aimed at creating state criminal and civil jurisdiction over Indian lands. Unlike the House bills, however, S.2467 dealt with four of the five states covered by the House bills.

---

1. H.R. 1063 applied only to California; H.R. 3404 applied only to Oregon; H.R. 4592 applied only to Minnesota; H.R. 4367 applied only to Nevada; and H.R. 1837 and H.R. 3494 applied only to Wisconsin.

The House Interior Committee amended H.R. 1063 to read exactly the same as S.2467. By doing so it obviated the necessity of reconciling Senate and House versions of similar bills and consolidated four bills which were pending before it into one.2 Undoubtedly considerations of efficiency were at the base of this decision, not broad policy determinations as the State contends. A glance at either the Committee report (House Rept. No. 848, 83d Cong., 1st Sess., 1953) or the remarks upon passage of the bill (99 Cong. Rec. 10782 (1953) supports this view, since in neither instance was there any discussion of the changed wording which the state contends demonstrates the legislative intent to broaden state jurisdiction to include Indian land use controls.

II

PUBLIC RESOURCES CODE §4291 and 25 CFR §141.3 BOTH ATTEMPT TO REGULATE FOREST LANDS AND CONTAIN MUTUALLY CONFLICTING PROVISIONS.

The State contends that Public Resources Code §4291 and 25 CFR §141.3 are not in conflict since the latter applies to "forest

---

2. The fact that Nevada was not included in the amended H.R. 1063 and that Nebraska was added reflects the treatment of those two states in S.2467 and adds further support to the contention that the House's intent was merely to adopt S.2467 in toto for technical reasons of efficiency and not broad policy considerations.

lands" and not to lands on which Indian homesites or other structures are maintained. The distinction of forest lands from homesites is entirely without merit, as it is inconsistent with both the logical reading of the statutes involved here and the traditions of the Indian people.

24 CFR §141.3 is a comprehensive federal regulation dealing with "Indian forest lands". A state statute, such as Public Resources Code §4291, which commands the cutting and removal of "all flammable vegetation or other combustible growth" within thirty feet of any structure (a minimum area of 3600 sq.ft.) certainly conflicts with 25 CFR 141.3 which sets out in some detail when and under what conditions the timber land is to be cut. As such, state regulation here transgresses upon that area which has specifically been reserved to the federal government under 18 U.S.C. §1162(b).

The state attempts to ignore this conflict by distinguishing between "forest lands" and lands upon which Indians have built their homes. The state, however, is unable to advance any reason why Indians may not place their homes upon "forest lands", but merely contends that the concepts are somehow mutually exclusive. Such a conclusion is not only unnecessary but is in conflict with the very statute the state relies upon for conviction in this case. Public Resources Code §4291 applies to "any building or structure... upon...forest-covered lands." Certainly the state cannot contend that there is to be a distinction between the "forest lands" of 25 CFR §141.3 and the "forest-covered lands" of Public Resources Code §4291. That the two statutes apply to the same type of land and that their provisions conflict should be evident.

## III.

## A WARNING DELIVERED BY A FOREST SERVICE OFFICER CANNOT LEGITIMIZE A PROSECUTION UNDER A STATUTE WHICH OTHERWISE WOULD BE VOID FOR VAGUENESS.

The State contends that the warnings issued by a Forest Service officer were sufficient to put petitioner on notice that he could be prosecuted under Public Resources Code §4291 and that he cannot now be heard to complain of the vagueness of the statute. That position is contrary to Lanzetta v. New Jersey 306 U.S. 451 (1939), cited in the petition. The Court in Lanzetta was concerned that statutes give fair warning of the actions which they prohibit. The Court there said:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its very meaning and differ as to its application, violates the first essential of due process of law.

Both the Interior Department Solicitor (Opinion M-36768 at 2) and the Supreme Court of the State of Washington (Snohomish County v. Seattle Disposal Company 425 P.2d 22, (Wash. 1967), cert. denied 389 U.S. 1006) have differed with the State of California here in the applicability of land use controls under 18 U.S.C. §1162. That a Forest Service officer delivered his opinion to the petitioner on the meaning of the statute did not make the statute any less vague. It is the statute, not the Forest Service officer's order, that petitioner is

charged with violating; and the statute itself does not give a fair warning that state land use laws apply to an Indian on an Indian reservation.

IV.

THE ALLEGATIONS OF THE PRESENCE OF "GARBAGE, PAPERS, AND GENERAL DEBRIS" ARE IRRELEVANT TO A PROSECUTION UNDER PUBLIC RESOURCES CODE §4291.

The state's continued reference, both in the complaint and in its present brief (p.3), to the presence of "garbage, papers, and general debris" upon petitioner's land is without legal significance and is irrelevant to the present proceedings. Public Resources Code §4291 makes no reference to any of these items, but forbids only "flammable vegetation or other combustible growth." None of the items mentioned can reasonably be considered "vegetation" or "growth" and therefore have no bearing on this case.

Dated: September 23, 1971

Respectfully submitted,

George F. Duke
Lee J. Sclar
William P. Lamb
CALIFORNIA INDIAN LEGAL SERVICES

John D. Barr
COSHOW AND BARR

BY: _____
George F. Duke